

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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NOV 26 1975

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FILE: B-183759

DATE:

MATTER OF: Entitlement to pay and allowances as a result
of correction of records - Commander Clarence S.
Hall, USCG, Retired

DIGEST: Where a properly constituted Correction Board concluded that a member's records should be corrected, but recommends that no correction action be taken because it would create substantial new precedent, and where the General Counsel, acting through his delegated authority, agrees with Board's finding and conclusion as to merits of case, but on a detailed finding that no policy reason exists to support denial, reverses recommendation to deny correction, such action is consistent with law and cases cited. In light of finality provision of 10 U.S.C., 1552(a), no basis exists to question member's pay and allowance entitlements arising from such correction action.

This action is in response to a letter from Mr. E. J. Rowe, Authorized Certifying Officer, United States Coast Guard, requesting an advance decision concerning the propriety of certifying a voucher in favor of Commander Clarence S. Hall, 3484, USCG (Retired), for the difference between the active duty pay and allowances of a commander and that of a captain for the period July 20, 1968, through March 31, 1975, incident to a correction of his military records.

The record indicates that the member, after retiring from the United States Coast Guard on August 1, 1964, in the grade of commander, was recalled to active duty in the same grade on July 1, 1966. In October 1967 he was selected for promotion to the rank of captain but was never actually promoted, apparently due to a physical disability which caused him to fail a physical examination given to him by the Coast Guard on January 9, 1968. It further appears that but for his failure to pass the physical examination his promotion would have been finally approved.

Due to his physical condition, a Coast Guard Physical Evaluation Board recommended that the member be retired and placed on the temporary disability retired list. Despite the intervening recommendation of a Physical Review Council that the member be merely

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released from active duty (returned to the retirement list) with retired pay recomputed to take into account the additional two years he served on active duty, he was placed on the temporary disability retired list. In September 1968 the Coast Guard implemented the Council's recommendations, noting that its earlier disposition was in error.

The member apparently took issue with that action, claiming that under 14 U.S.C. 294 (1970) he was entitled to retired pay based upon the rank of captain and on September 9, 1969, he filed an application with the Coast Guard Board for the Correction of Military Records to have his military records changed to reflect such claim. On May 18, 1973, the Correction Board denied the member's application. However, this decision was disapproved by the Acting General Counsel of the Department of Transportation and the relief applied for was granted.

Doubt is expressed in the submission as to the propriety of the Acting General Counsel's action, for the reason that it appears that he summarily reversed the findings of the Correction Board. In this regard, it is further stated in the submission that if there were compelling legal reasons for so doing, the board should have been directed to reconvene and resume deliberations or in the alternative, the case should have been referred to a newly constituted board for reconsideration de novo.

The controlling provision of law relating to the correction of records is contained in 10 U.S.C. 1552 (1970), which provides in part:

"(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States."

Responsibility for the Coast Guard now rests with the Secretary of Transportation under 49 U.S.C. 1655(b) (1970) and pursuant to such authority, the Secretary has delegated to the General Counsel of the Department of Transportation the authority to review and take final action on referrals of the findings of the Coast Guard Board for the Correction of Military Records. See 49 C.F.R. 1.59(e) (1974).

While we recognize that the before-quoted code provisions preclude review of determinations of the Secretary in matters concerning correction of service records of members when such action is through a properly constituted correction board (see B-182883, February 13, 1975), we have refused to recognize such determinations which were contrary to the law and procedures set out in the implementing regulations. See 32 Comp. Gen. 294 (1952) and 52 Comp. Gen. 952 (1973), and cases cited therein. Compare Ashe v. McNamara, 355 F. 2d 277, 281 (1st Cir. 1965) and Champagne v. Schlesinger, 506 F. 2d 979, 983 (7th Cir. 1974).

It has also been recognized that the Secretary may overturn the action of a correction board when such action is not justified by the record before it. Proper v. United States, 139 Ct. Cl. 511 (1957). Further, in Hertzog v. United States, 167 Ct. Cl. 377, 387 (1964), it was stated that the Secretary, in overturning a correction board recommendation, may go outside the record and issues before the board where policy reasons so dictate, but that "he must justify such a departure by explicitly stating the 'policy reasons' behind such action."

Here, the Secretary (acting through his delegate, the Acting General Counsel) did consider the recommendation of the Board. Further, a detailed discussion of the Board's recommendations was included in the Acting General Counsel's ruling and that ruling in the final analysis, carries out the Board's clear conclusion as to the merits of the case. The only item in the record challenged by the Acting General Counsel was the Board's ultimate conclusion, that, despite the finding of inequity and injustice in the member's case, to rule in favor of the member would create a substantial new precedent without an adequate opportunity for administrative review. In his review of the Board's record, the Acting General Counsel merely

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concluded that no policy reason existed to support the board's recommendation to deny the petition. In this regard, it was explicitly stated on page 8 of the Decision of the General Counsel that:

"If, as a matter of equity, the petitioner is entitled to relief, a withholding of relief for fear of its precedential effects would not appear to be warranted."

Therefore, since the Acting General Counsel's determination regarding the merits of the case was fully in accord with the Board's findings, it is our view that such action was within his authority under the law and in light of the finality provision of 10 U.S.C. 1552(a), supra, there is no basis upon which this Office may question Commander Hall's entitlement to pay and allowances as a result of such determination.

Accordingly, the voucher in question may be paid, if otherwise correct.

R. F. KELLER

Deputy } Comptroller General
of the United States